

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Vitec Group Communications Limited)	File No. EB-05-SE-172
Cambridge, United Kingdom)	NAL/Acct. No. 200632100009
)	FRN 0012947594
)	

MEMORANDUM OPINION AND ORDER

Adopted: April 18, 2007

Released: April 20, 2007

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny the petition for reconsideration filed by Vitec Group Communications Limited (“Vitec”). Vitec seeks reconsideration of a *Forfeiture Order*¹ issued by the Spectrum Enforcement Division (“Division”) of the Enforcement Bureau (“Bureau”) to Vitec on October 31, 2006, which assessed a forfeiture of eleven thousand two hundred dollars (\$11,200) for willful and repeated violation of Section 302(b) of the Communications Act of 1934, as amended (“Act”),² and Section 2.803(a)(1) of the Commission’s Rules (“Rules”).³ The noted violations involve Vitec’s marketing of unauthorized radio frequency devices in the United States.

II. BACKGROUND

2. In May 2005, the Bureau received a complaint alleging that Clear-Com Communication Systems⁴ was marketing unapproved radiofrequency devices in the United States in violation of Section 302(b) of the Act and Section 2.803(a) of the Rules. Specifically, the complaint indicated that Vitec advertised an unapproved digital wireless intercom system called the “CellCom Digital Wireless Intercom” (“CellCom 10”)⁵ in the April 2005 issue of *Broadcast Engineering* and also displayed it at the 2005 National Association of Broadcasters (“NAB”) trade show in Las Vegas, NV. Digital wireless intercom systems, such as the CellCom 10, are classified as intentional radiators⁶ and are required by

¹ *Vitec Group Communications Limited*, Forfeiture Order, 21 FCC Rcd 12871 (Enf. Bur., Spectrum Enf. Div. 2006) (“*Forfeiture Order*”).

² 47 U.S.C. § 302a(b).

³ 47 C.F.R. § 2.803(a)(1).

⁴ Clear-Com Communications Systems is a trade name that Vitec, a British company, uses in the United States. In this *Memorandum Opinion and Order*, we refer to the company as Vitec throughout.

⁵ Vitec subsequently identified this device as the “CellCom 10” digital wireless intercom system. Letter from Christopher D. Imlay, Esq. to Kathryn S. Berthot and Thomas D. Fitz-Gibbon, Spectrum Enforcement Division, Enforcement Bureau (December 6, 2005) at 2.

⁶ An intentional radiator is “[a] device that intentionally generates and emits radio frequency energy by radiation or induction.” 47 C.F.R. § 15.3 (o).

Section 15.201 of the Rules⁷ to be approved prior to marketing through the equipment certification⁸ procedures described in Sections 2.1031 – 2.1060 of the Rules.⁹

3. The Division subsequently began an investigation of Vitec's marketing activities. As part of the investigation, the Division obtained a copy of the April 2005 issue of *Broadcast Engineering* and confirmed that it contains an advertisement for the CellCom 10. The advertisement describes the CellCom 10 as "revolutionary" and exhorts readers to "join the revolution." Section 2.803(c) of the Rules¹⁰ allows the advertising or display of radio frequency devices prior to equipment authorization only if the following disclaimer notice is provided:

This device has not been authorized as required by the rules of the Federal Communications Commission. This device is not, and may not be, offered for sale or lease, or sold or leased, until authorization is obtained.

The *Broadcast Engineering* advertisement did not contain this notice.

4. The Division determined through internet research that the website www.clearcom.com contained photographs of Vitec's display of the CellCom 10 at the 2005 National Association of Broadcasters ("NAB") trade show, which took place April 16-21, 2005. The disclaimer notice specified by Section 2.803(c) of the Rules was not visible in those photographs.

5. The Division sent Vitec a letter of inquiry ("LOI")¹¹ on October 24, 2005. Vitec submitted responses both directly¹² and through its counsel.¹³ In its direct response, Vitec stated that it obtained equipment certifications¹⁴ covering its digital wireless intercom system on November 2, 2005, and that it did not sell or distribute the product in the United States prior to the grant of the certifications.¹⁵ Vitec acknowledged, however, that "the advertising in *Broadcast Engineering* and display at NAB did take place as you note during April 2005, the object being to market this product prior to launch."¹⁶ In the subsequent response submitted through its counsel, Vitec denied any violation of the

⁷ 47 C.F.R. § 15.201.

⁸ A certification is an equipment authorization issued by the Commission, based on representations and test data submitted by the applicant. *See* 47 C.F.R. § 2.907(a).

⁹ 47 C.F.R. §§ 2.1031 – 2.1060

¹⁰ 47 C.F.R. § 2.803(c).

¹¹ Letter from Kathryn S. Berthot, Deputy Chief, Spectrum Enforcement Division, Enforcement Bureau, to Clear-Com Communications Systems (October 24, 2005).

¹² Letter from Chris Exelby, Managing Director, Vitec Group Communications, to Thomas D. Fitz-Gibbon, Spectrum Enforcement Division, Enforcement Bureau (November 25, 2005) ("November 25, 2005, LOI Response").

¹³ Letter from Christopher D. Imlay, Esq., to Kathryn S. Berthot and Thomas D. Fitz-Gibbon, Spectrum Enforcement Division, Enforcement Bureau (December 6, 2005) ("December 6, 2005, LOI Response").

¹⁴ The Commission's equipment authorization data base indicates that, on November 2, 2005, Vitec was granted equipment certifications under FCC ID # S3O-CEL-BP (portable two-way radios) and FCC ID # S3O-CEL-TA (base station) for the Vitec CellCom 10 Digital Wireless Intercom.

¹⁵ November 25, 2005, LOI Response at 1.

¹⁶ *Id.*

Act or the Rules.¹⁷ The Division directed a second LOI to Vitec on February 13, 2006.¹⁸ In its response to that letter, Vitec stated that it manufactures its CellCom 10 digital wireless intercom system in England and imports it into the United States.¹⁹ Vitec asserted that it did not “market or sell” the system in the United States prior to its receipt of the equipment certifications on November 2, 2005.²⁰

6. On April 14, 2006, the Division issued a *Notice of Apparent Liability for Forfeiture* (“NAL”) to Vitec in the amount of fourteen thousand dollars (\$14,000) for apparent willful and repeated violation of Section 302(b) of the Act and Sections 2.803(a)(1) of the Rules.²¹ In its NAL response, Vitec argued that the proposed forfeiture should be cancelled because its pre-certification advertising and display of the Cellcom 10 digital wireless intercom system did not violate Section 302(b) of the Act or Section 2.803(a)(1) of the Rules, and that, if there was a basis for a monetary forfeiture, the amount proposed by the NAL was excessive.²² Vitec provided a “Statement Under Penalty of Perjury” indicating that it included the disclaimer notice set forth in Section 2.803(c) when it displayed the CellCom 10 at the 2005 NAB convention. Based on this statement, the Division found that the display of the CellCom 10 at the NAB convention did not violate Section 302(b) of the Act and Section 2.803(a)(1) of the Rules. The Division, however, concluded that the advertisement of the Cellcom 10 in *Broadcast Engineering* magazine without a disclaimer notice did violate Section 302(b) of the Act and Section 2.803(a)(1) of the Rules.²³ The Division also concluded that Vitec had a history of overall compliance which warranted reduction of the forfeiture amount from \$14,000 to \$11,200, but rejected Vitec’s other arguments for reduction of forfeiture amount.²⁴

7. In its petition for reconsideration, Vitec again argues that its pre-certification advertising of the Cellcom 10 did not violate the Section 302(b) of the Act or Section 2.803(a)(2) of the Rules. Vitec also contends that, if there is a basis for a monetary forfeiture, the \$11,200 forfeiture amount assessed in the *Forfeiture Order* is excessive.²⁵

III. DISCUSSION

8. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (“Act”),²⁶ Section 1.80 of the Rules,²⁷ and the

¹⁷ December 6, 2005, LOI Response at 2.

¹⁸ Letter from Kathryn S. Berthot, Deputy Chief, Spectrum Enforcement Division, Enforcement Bureau, to Christopher D. Imlay, Esq. (February 13, 2006).

¹⁹ Letter from Christopher D. Imlay, Esq., to Kathryn S. Berthot and Thomas D. Fitz-Gibbon, Spectrum Enforcement Division, Enforcement Bureau (March 2, 2006) at 3.

²⁰ *Id.* at 3.

²¹ *Vitec Group Communications, Ltd.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 4025 (Enf. Bur., Spectrum Enf. Div., 2006).

²² Letter from Christopher D. Imlay, Esq. to Chief, Spectrum Enforcement Division, Enforcement Bureau (May 18, 2006) (“NAL response”) at 5-12.

²³ 21 FCC Rcd at 12890.

²⁴ *Id.* at 12891-92.

²⁵ Petition for Reconsideration at 6-12.

²⁶ 47 U.S.C. § 503(b).

Commission's *Forfeiture Policy Statement*.²⁸ In assessing forfeitures, Section 503(b)(2)(E) of the Act requires that we take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.²⁹

9. Section 302(b) of the Act provides that “[n]o person shall manufacture, import, sell, offer for sale, or ship devices or home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section.” Section 2.803(a)(1) of the Rules provides that:

Except as provided elsewhere in this section, no person shall sell or lease, or offer for sale or lease (including *advertising* for sale or lease), or import, ship, or distribute for the purpose of selling or leasing or offering for sale or lease, any radio frequency device³⁰ unless ... [i]n the case of a device that is subject to certification, such device has been authorized by the Commission in accordance with the rules in this chapter and is properly identified and labeled as required by § 2.925 and other relevant sections in this chapter [*emphasis added*].

10. Vitec has admitted that it advertised its digital wireless intercom system in the April 2005 issue of *Broadcast Engineering* before the grant of an equipment authorization and has furnished a copy of the advertisement, which does not include the disclaimer notice specified by Section 2.803(c) of the Rules.³¹ Vitec, however, reiterates the argument made in its response to the *NAL* that it was not required to include the disclaimer notice because the *Broadcast Engineering* advertisement did not offer or advertise the CellCom 10 for “sale or lease.”³² Specifically, Vitec argues that the CellCom 10 was not available for sale³³ and that its advertisement “did not exhort the reader to buy anything or do anything other than visit the Clear Com booth at the NAB convention.”³⁴ First, the lack of availability of the CellCom 10 at the time of the pre-certification advertising is not material.³⁵ We disagree, however, with the claim that the advertisement did not exhort the reader to buy anything. To the contrary, the advertisement described the CellCom 10 as “revolutionary” and exhorted readers to “join the revolution.” Its clear intent was to generate future sales of the CellCom 10. Furthermore, Vitec’s construction of the Commission’s marketing regulations to permit “pre-marketing a product that is anticipated to be available

²⁷ 47 C.F.R. § 1.80.

²⁸ *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (“*Forfeiture Policy Statement*”).

²⁹ 47 U.S.C. § 503(b)(2)(E).

³⁰ 47 C.F.R. § 2.801 defines a radiofrequency device as “any device which in its operation is capable of emitting radiofrequency energy by radiation, conduction, or other means.”

³¹ *NAL* response at 6-7, Exhibit A.

³² *NAL* response at 6-7; Petition for Reconsideration at 6-8.

³³ *NAL* response at 7; Petition for Reconsideration at 7.

³⁴ Petition for Reconsideration at 8.

³⁵ See *ACR Electronics, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 22293 (2004) (proposing a \$75,000 forfeiture for pre-certification advertising of a device that was not yet available for sale without the requisite disclaimer), *forfeiture ordered*, 21 FCC Rcd 3698 (2006) (“*ACR Electronics*”).

in the future”³⁶ would largely eviscerate the prohibition against pre-certification advertising without a disclaimer and likely lead to widespread abuse of the marketing regulations. We will not construe the rules to allow such “pre-marketing” of unauthorized devices without the disclaimer required by Section 2.803(c).

11. Accordingly, we reject Vitec’s argument and find that Vitec marketed the CellCom 10 prior to certification without any disclaimer notice. We therefore affirm the Division’s determination that Vitec willfully³⁷ and repeatedly³⁸ violated Section 302(b) of the Act and Section 2.803(a)(1) of the Rules.

12. Vitec also argues that the one year statute of limitations of Section 503(b)(6)(B) of the Act³⁹ bars imposition of a forfeiture on the basis of Vitec’s *Broadcast Engineering* advertisement.⁴⁰ In its response to the *NAL*, Vitec claimed that the statute of limitations expired before the issuance of the *NAL* because the *Broadcast Engineering* issue in which Vitec’s advertisement appeared, April 2005, was distributed to subscribers during March 2005, which is more than one year before the April 14, 2006, issuance of the *NAL*.⁴¹ The Division rejected that argument.⁴² Vitec now contends that the violation, if any, occurred only “on the first day of publication of that issue of *Broadcast Engineering* magazine” during March 2005. We disagree. As stated in the *Forfeiture Order*, the April issue of *Broadcast Engineering* was current until the end of that month and, therefore, Vitec’s violation continued through the end of April 2005, which is within the one year statute of limitations period.⁴³

13. Vitec further argues that, if there is a basis for a monetary forfeiture, the \$11,200 forfeiture amount determined by the *Forfeiture Order* is excessive.⁴⁴ First, Vitec contends that the \$14,000 base forfeiture amount calculated by the Division is excessive. The base forfeiture amount for

³⁶ Petition for Reconsideration at 8.

³⁷ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘willful,’ ... means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act” See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387 (1991).

³⁸ Section 312(f)(2) of the Act provides that “[t]he term ‘repeated,’ ... means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” 47 U.S.C. § 312(f)(2).

³⁹ Section 503(b)(6)(B) of the Act provides that

No forfeiture penalty shall be determined or imposed against any person under this subsection if such person does not hold a broadcast station license issued under subchapter III of this chapter and if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability.

47 U.S.C. § 503(b)(6)(B).

⁴⁰ Petition for Reconsideration at 12.

⁴¹ *NAL* response at 6.

⁴² 21 FCC Rcd at 12890.

⁴³ *Id.* at 12890.

⁴⁴ Petition for Reconsideration at 9-11.

marketing unauthorized equipment is \$7,000.⁴⁵ The Division found that the CellCom 10 included two types of uncertified devices with separate equipment authorizations – base stations and mobile transmitters – whose marketing constituted separate offenses and, thus, found that the aggregate base forfeiture amount is \$14,000.⁴⁶ Vitec now argues that the CellCom 10 is a single device because it is sold as a single model “consisting of two components, neither of which has any function independent of the other component.”⁴⁷ Vitec’s designation and marketing of the base station and mobile transmitters constituting the CellCom 10 as a single model is not dispositive. While it is true that the CellCom 10 can function only if its users have both the base station and mobile transmitters, it does not follow that the base station and mobile transmitters must be sold only as a package. For example, the base station and mobile transmitters could be sold separately as replacements and mobile transmitters could be sold separately to expand the number of mobile transmitters.⁴⁸ We find that Vitec’s marketing strategy does not change the essential nature of the CellCom 10 base station and mobile transmitters as separate and distinct devices. We, accordingly, find that the CellCom 10 included two distinct kinds of devices and that \$14,000 is the correct base forfeiture amount.

14. In addition, Vitec contends that four cases⁴⁹ cited in the *Forfeiture Order* “validate” its contention that the \$11,200 forfeiture amount is excessive. Specifically, Vitec argues that, in contrast to this proceeding, those cases involved “actual importation, actual marketing and actual sale of uncertified equipment to the public, with a potential for harmful interference.”⁵⁰ Vitec is apparently suggesting that, because of the absence of “actual sales,” its pre-certification marketing was, at most, a minor violation. As stated in the *Forfeiture Order*, a violation of a provision of the Communications Act cannot be classified as a “minor” violation.⁵¹ Moreover, we note that the Commission has previously found that a \$75,000 forfeiture proposed for advertising an uncertified device that was not yet available for sale was not excessive.⁵² Further, we find nothing in the cases cited by Vitec that supports further reducing the forfeiture amount in this case.⁵³ We find, accordingly, that the \$11,200 imposed by *Forfeiture Order* is not excessive and is the proper forfeiture amount.

⁴⁵ *Forfeiture Policy Statement* and 47 C.F.R. § 1.80(b)(4).

⁴⁶ 21 FCC Rcd at 12891.

⁴⁷ Petition for Reconsideration at 9.

⁴⁸ Because the devices have separate equipment authorizations, FCC ID S3O-CEL-BP and FCC ID S3O-CEL-TA, they are authorized to be marketed separately.

⁴⁹ *Samson Technologies, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 4221 (2004) (\$35,000 forfeiture amount proposed), *consent decree issued*, 19 FCC Rcd 24542 (2004); *Pilot Travel Centers, LLC*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 23113, 23117 (2004) (\$125,000 forfeiture amount proposed), *consent decree issued*, 21 FCC Rcd 5308 (2006); *Behringer USA, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd. 1820, 1827 (2006) (\$1,000,000 forfeiture amount proposed), *response pending*; *San Jose Navigation, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 2873, 2877 (2006) (\$75,000 forfeiture amount proposed), *forfeiture ordered*, 22 FCC Rcd 1040 (2007).

⁵⁰ Petition for Reconsideration at 11.

⁵¹ 21 FCC Rcd at 12892; *see also Catherine R. Waddill*, Memorandum Opinion and Order, 13 FCC Rcd 23861, 23866 (1998); *Paging Network of Los Angeles, Inc.*, Notice of Apparent Liability for Forfeiture, 8 FCC Rcd 1702, 1703 (1993).

⁵² *ACR Electronics*, 21 FCC Rcd at 3706.

⁵³ Notably, all of those cases involved forfeiture amounts much larger than \$11,200. *See supra* n. 48.

15. We have examined Vitec's petition for reconsideration pursuant to the statutory factors prescribed by Section 503(b)(2)(E) of the Act and Section 1.80 of the Rules, and in conjunction with the *Forfeiture Policy Statement* as well. As a result of our reconsideration, we find that neither cancellation nor reduction of the forfeiture is warranted and that the *Forfeiture Order* should be affirmed.

IV. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of the Act⁵⁴ and Section 1.106 of the Rules,⁵⁵ Vitec's petition for reconsideration of the *Forfeiture Order* **IS DENIED**.

17. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Memorandum Opinion and Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.⁵⁶ Payment of the forfeiture must be made by check, money order or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to the Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for full payment under an installment plan should be sent to: Associate Managing Director – Financial Operations, 445 12th Street, S.W., Room 1A625, Washington, D.C. 20554.⁵⁷

18. **IT IS FURTHER ORDERED** that a copy of this *Memorandum Opinion and Order* shall be sent by first class mail and certified mail return receipt requested to Vitec Group Communications Limited, 4065 Hollis Street, Emeryville, CA 94608, and to its attorney, Christopher D. Imlay, Esq., Booth, Freret, Imlay & Tepper, P.C., 14356 Cape May Road, Silver Spring, MD 20904-6011.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau

⁵⁴ 47 U.S.C. § 405.

⁵⁵ 47 C.F.R. § 1.106.

⁵⁶ 47 U.S.C. § 504(a).

⁵⁷ See 47 C.F.R. § 1.1914.